Supreme Court U.S.
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No. 02-712

IN THE
SUPREME COURT OF THE UNITED STATES

SHAWNEE PATTEN

Petitioner,

v.

WAL-MART STORES EAST, INC.

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The First Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for the First Circuit correctly held that Petitioner was not entitled to a Price Waterhouse mixed-motive charge to the jury because she failed to present direct evidence of discrimination, and whether Petitioner waived her objection to the jury charge prior to or during trial?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

STATEMENT OF THE CASE 1

ARGUMENT 4

THE FIRST CIRCUIT CORRECTLY HELD THAT PETITIONER WAS NOT ENTITLED TO A MIXED-MOTIVE CHARGE BECAUSE SHE FAILED TO PRESENT DIRECT EVIDENCE OF DISCRIMINATORY ANIMUS 4

THE PETITIONER HAS NOT PRESENTED A QUESTION OF PUBLIC IMPORTANCE IN THE CONTEXT OF MEANINGFUL LITIGATION 8

CONCLUSION 11

TABLE OF AUTHORITIES

Page

Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86 (1st Cir. 1996) 5

Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002) 6, 7, 8

Davet v. Maccarone, 973 F.2d 22 (1st Cir. 1992) 10

EEOC v. Alton Packaging Corp., 901 F.2d 920 (11th Cir.1990) 6

Febres v. Challenger Caribbean Corp., 214 F.3d 57 (1st Cir. 2000) 5, 7

Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572 (1st Cir. 1999) 5, 7

Fuller v. Phipps, 67 F.3d 1137 (4th Cir. 1995) 6

Gagnon v. Sprint Corp., 284 F.3d. 839 (8th Cir. 2002) 5

Granfinanciera v. Nordberg, 492 U.S. 33 (1989) 9

Henley Drilling Co. v. McGee, 36 F.3d 143 (1st Cir. 1994) 10

Hoffman v. Caterpillar, Inc., 256 F.3d 568 (7th Cir. 2001) 5

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387 (1923) 8

Lehman v. Lycoming County Children's Serv., 458 U.S. 502 (1982) 8

Manzer v. Diamon Shamrock Chems. Co., 29 F.3d 1078 (6th Cir. 1994) 6

Page

Mark v. United States, 430 U.S. 188 (1977) 5

The Monrosa v. Carbon Black, Inc, 359 U.S. 180 (1959) 9, 11

Mooney v. Aramco Services Co., 54 F.3d 1207 (5th Cir. 1995) 6

Pagano v. Frank, 983 F.2d 343 (1st Cir. 1993) 10

Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603 (1st Cir. 1980) 10

Phinney v. Wentworth Douglas Hosp., 199 F.3d 1 (1st Cir. 1999) 10

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 4, 8

Shorter v. ICG Holdings, Inc., 188 F.3d 1204 (10th Cir.1999) 5, 6

Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089 (3d Cir. 1995) 6

Thomas v. Arn, 474 U.S. 140 (1985) 10

Thomas v. NFL Players Ass'n, 131 F.3d 198 (D.C. Cir. 1997), *vacated in part by*, 1998 U.S. App. LEXIS 3634 (D.C. Cir. Feb. 25, 1998) 6

Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir. 1992) 6

U.S. v. N.Y. Telephone Co., 434 U.S. 159 (1977) 9

Weston-Smith v. Cooley Dickinson Hosp., Inc., 282 F.3d 60 (1st Cir. 2002) 5

Whitley v. Albers, 475 U.S. 312 (1986) 9

Statutes

42 U.S.C. § 12101 1

28 U.S.C. § 636(b)(1)(B) 1

5 M.R.S.A. § 4551 1

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BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals is reported at 300 F.3d 21. The opinion of the district court was rendered orally and unreported.

STATEMENT OF THE CASE

Petitioner Shawnee Patten brought this action against Wal-Mart under the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101, et. seq., and the Maine Human Rights Act ("MHRA"), 5 M.R.S.A. § 4551, alleging that

Wal-Mart terminated her employment because she suffered from a disability.

On May 1, 2001, Wal-Mart moved for summary judgment on all claims asserted in the Petitioner's Complaint. The summary judgment motion was referred to a magistrate judge for decision under 28 U.S.C. § 636(b)(1)(B). The magistrate judge issued a Recommended Decision and granted Wal-Mart partial summary judgment as to Petitioner's claims for punitive damages. Although the magistrate denied Wal-Mart summary judgment on Petitioner's discrimination claims, he concluded that those claims were governed by the McDonnell Douglas burden-shifting analysis, and not a mixed-motive analysis because the Petitioner had not adduced any direct evidence of discriminatory animus. The magistrate's decision contained the standard notice advising that failure to file a timely objection would result in a waiver of the right to seek a *de novo* review by the district court and the right to appeal the district court's order.

In response to the magistrate's decision, Petitioner filed a partial objection "only to that part of the Recommended Decision concerning Plaintiff's claim for punitive damages." The district court issued an order adopting the Recommended Decision on July 12, 2001. Petitioner did not move for reconsideration of the district court's July 12, 2001 order adopting the Recommended Decision.

At trial, it was established that Petitioner suffers from Charcot-Marie Tooth disease, a form of muscular dystrophy. This condition does not prevent her from working, but limits her ability to walk. Wal-Mart accommodated her disability by reassigning her several times, granting her leaves of absence and implementing job modifications. However, Petitioner was ultimately terminated for excessive absenteeism. Specifically, in the twenty-three day period

prior to her termination, Petitioner failed to show up for work six times.

Petitioner contended that she was not discharged because of her tardiness and excessive absenteeism, but she was terminated because of her disability. She asserted that two statements allegedly made by Wal-Mart store managers were evidence of the discriminatory motive behind her discharge. Specifically, Petitioner recalled hearing an assistant manager say, "We know Shawnee has a disability, but we're just tired of this. We're tired of her, and we just don't feel that she needs to be here." The Petitioner also alleged that the assistant store manager told her, "We understand that you have health problems. We understand that you are disabled, but we don't want you working in this store."

At the close of evidence, the Petitioner requested a mixed-motive charge, and the district judge denied her request, finding, as the magistrate judge had, that a mixed-motive analysis was inappropriate because there was no direct evidence of discriminatory animus. After receiving instructions based on McDonnell Douglas, the jury returned a verdict in favor of Wal-Mart, finding that while Petitioner suffered from a disability as defined by the ADA, her disability was not the determining factor in her discharge from Wal-Mart.

Petitioner appealed to the First Circuit, asserting that the district court improperly refused to give a mixed-motive charge, and incorrectly instructed the jury that Petitioner's supervisor's discriminatory animus had to be the "determining factor," rather than a "motivating factor" in the decision to terminate her. The First Circuit affirmed the district court's jury instructions and found that the Petitioner was not entitled to a mixed-motive jury instruction because she failed to produce direct evidence of discrimination.

REASONS FOR DENYING THE WRIT

Petitioner's request for certiorari should be denied because she has not established any "real" conflict between the Circuits on an issue of public importance. For more than a decade, courts have interpreted Price Waterhouse as requiring plaintiffs to present direct evidence of discrimination before they are entitled to a mixed-motive charge. The First Circuit properly found in the present case that Petitioner was not entitled to a mixed-motive instruction due to her failure to present any direct evidence of discrimination.

In any event, Petitioner waived her right to appeal the magistrate judge's holding that mixed-motive analysis did not apply to her case. As a matter of law, she was prohibited from appealing that decision, a defect which fatally undermines her petition to this Court now. Petitioner simply has not raised any issues that would warrant review by this Court, and certiorari should be denied.

I. THE FIRST CIRCUIT CORRECTLY HELD THAT PETITIONER WAS NOT ENTITLED TO A MIXED-MOTIVE CHARGE BECAUSE SHE FAILED TO PRESENT DIRECT EVIDENCE OF DISCRIMINATORY ANIMUS.

1. The First Circuit Properly Held That Petitioner Was Required To Present Direct Evidence Of Discriminatory Animus In Order To Be Eligible For A Mixed-Motive Charge.

In rendering its opinion, the First Circuit adhered to well established authority. The "direct evidence" requirement was originally promulgated in Price Waterhouse v. Hopkins, 490 U.S. 228, 276-77 (1989) (O'Connor, J., concurring) ("in order to justify shifting the burden on the

issue of causation to the defendant, a disparate treatment plaintiff must show by direct evidence that an illegitimate criterion was a substantial factor in the decision."). Because Justice O'Connor based her concurrence on the narrowest grounds, her direct evidence requirement has been properly interpreted as the holding of the Supreme Court for more than a decade.[1]

In accordance with Price Waterhouse, the First Circuit has consistently held that in order to be entitled to a mixed-motive jury instruction, plaintiffs in employment discrimination cases must present direct evidence of discriminatory animus. Weston-Smith v. Cooley Dickinson Hosp., Inc., 282 F.3d 60, 64 (1st Cir. 2002); Febres v. Challenger Caribbean Corp., 214 F.3d 57, 62 (1st Cir. 2000) ("the predicate for obtaining a mixed-motive jury instruction [is] the existence of direct evidence"); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572 (1st Cir. 1999); Ayala-Gerena v. Bristol Myers-Squibb Co., 95 F.3d 86, 95-96 (1st Cir. 1996).

Moreover, nearly all other circuits have similarly interpreted Price Waterhouse as requiring plaintiffs to present direct evidence of discriminatory animus in order to trigger a mixed-motive analysis. Gagnon v. Sprint Corp., 284 F.3d. 839, 849-50 (8th Cir. 2002) ("Absent direct evidence of discrimination invoking the mixed-motive analysis of Price Waterhouse, the burden-shifting analysis of McDonnell Douglas applies to claims of retaliation."); Hoffman v. Caterpillar, Inc., 256 F.3d 568, 574 (7th Cir. 2001) (In an ADA action, employee who has direct evidence of discriminatory intent is not required to proceed under

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[1] Mark v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, "the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds".")

McDonnell Douglas burden-shifting approach.); Shorter v. ICG Holdings, Inc., 188 F.3d 1204, 1208 n.4 (10th Cir. 1999) ("Generally, a mixed motives analysis only applies once a plaintiff has established direct evidence of discrimination."); Mooney v. Aramco Services Co., 54 F.3d 1207, 1216 (5th Cir. 1995) ("The Price Waterhouse, mixed-motive theory of discrimination comes into play where *direct* evidence of discrimination is presented, but the employer asserts that the same adverse employment decision would have been made regardless of discrimination."); Fuller v. Phipps, 67 F.3d 1137, 1142 (4th Cir. 1995) ("To earn a mixed-motive instruction...a plaintiff must satisfy the evidentiary burden necessary to make out a mixed-motive case. This requires "direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion."); Starceski v. Westinghouse Elec. Corp., 54 F.3d 1089, 1096 n.4 (3d Cir. 1995) ("In a "mixed-motives" or Price Waterhouse case, the employee must produce direct evidence of discrimination..."); Manzer v. Diamon Shamrock Chems. Co., 29 F.3d 1078, 1081 (6th Cir. 1994) (Price Waterhouse inapplicable where plaintiff only presented circumstantial evidence of discrimination); EEOC v. Alton Packaging Corp., 901 F.2d 920, 923 (11th Cir. 1990); But cf. Thomas v. NFL Players Ass'n, 131 F.3d 198 (D.C. Cir. 1997), vacated in part by, 1998 U.S. App. LEXIS 3634 (D.C. Cir. Feb. 25, 1998); Tyler v. Bethlehem Steel Corp., 958 F.2d 1176 (2d Cir. 1992).

Petitioner contends that the First Circuit's holding "conflicts in principle" with a recent Ninth Circuit decision, Costa v. Desert Palace, Inc., 299 F.3d 838 (9th Cir. 2002). Petitioner concedes, however, that these two decisions do not "direct[ly] conflict." Brief for Petitioner at 9. The cases are factually and legally distinguishable. In Costa, the plaintiff presented a significant amount of evidence that she was discriminated against because she was a woman. For example, the plaintiff was told that she did not deserve overtime because she had a family to support; she was told to

"walk more femininely, talk more femininely"; she was told that she had "more balls than the guys"; and she received harsher discipline than her male co-workers who engaged in the same activities she did. Id at 845-46. The plaintiff in Costa also presented evidence that managers used and encouraged others to direct sex-based slurs at the plaintiff. Id. at 846. In addition, the plaintiff in Costa presented evidence that the supervisor who signed her discharge declared on several occasions that he was going to "get rid of that bitch." Id. This is strong, unambiguous evidence of discriminatory animus. By contrast, Petitioner in the instant matter did not present the same amount or type of evidence as the plaintiff in Costa. Instead, Petitioner supported her disability claim with inherently ambiguous statements that were insufficient evidence of discriminatory animus.[2]

Thus, the First Circuit did not err in affirming the district court's refusal to give a mixed-motive jury instruction when Petitioner failed to present direct evidence of discrimination. Instead, the First Circuit's decision was grounded on well-established, non-conflicting precedent, and therefore certiorari should be denied.

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[2] The First Circuit properly found that the two statements relied on by the Petitioner in the present case were "inherently ambiguous" and clearly insufficient to constitute direct evidence of discrimination. The alleged statements included: "We're tired of her, and we just don't feel that she needs to be here." And, "We understand that you have health problems. We understand that you are disabled, but we don't want you working in this store." The alleged statements merely acknowledged that Petitioner was disabled and did not convey discriminatory animus. See Febres v. Challenger Caribbean Corp., 214 F.3d 57, 61 (1st Cir. 2000); Fernandes v. Costa Bros. Masonry, Inc., 199 F.3d 572, 583 (1st Cir. 1999).

II. THE PETITIONER HAS NOT PRESENTED A QUESTION OF PUBLIC IMPORTANCE IN THE CONTEXT OF MEANINGFUL LITIGATION

1. The Petitioner Has Not Alleged A "Real" Conflict Between The Ninth And First Circuit

This Court has held that it will only grant certiorari where the case raises "questions of importance not heretofore considered by this Court and over which the circuits are divided." Lehman v. Lycoming County Children's Serv., 458 U.S. 502, 507 (1982). Petitioner simply cannot meet this standard. First, this Court has already ruled on this issue in Price Waterhouse, the case in which the "direct evidence" requirement was first promulgated. 490 U.S. 228, 276-77 (1989) (O'Connor, J., concurring). It is unnecessary to revisit this issue in the instant matter because nearly all the circuit courts have subsequently applied the same "direct evidence" standard articulated in Price Waterhouse and utilized by the First Circuit in the case at bar. In fact, Petitioner's suggestion that this Court abandon its previously established "direct evidence" requirement would cause a great upheaval in the area of employment discrimination law, as courts have relied on the Price Waterhouse evidentiary standard for more than a decade to distinguish pretext and mixed-motive cases. See *infra* pp. 5-6.

Second, the Petitioner has admittedly failed to allege a "real" conflict between the Ninth and First Circuits. Certiorari will only be granted "in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

Despite the fact that there is no direct conflict between the present case and the Ninth Circuit's Costa

decision, Petitioner posits that there is a "potential" for conflict. This Court should not engage in the sort of speculation the Petitioner is suggesting. "Possible conflicts" are "abstract", insignificant and do not involve the "real and embarrassing" type of conflict that would warrant consideration by this Court.

2. This Case Is Not Appropriate For Certiorari Because Petitioner Waived Her Objection As To The Issue Now Being Raised.

The Petition should also be denied because Petitioner's appeal was procedurally defective. This Court has long held that it will only decide questions of public importance "in the context of meaningful litigation." The Monrosa v. Carbon Black, Inc, 359 U.S. 180, 184 (1959). "[The Court's] function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial. Resolution [of the conflict among circuits] can await a day when the issue is posed less abstractly." Id.

In the instant matter, Petitioner did not preserve for appeal her right to challenge her eligibility for mixed-motive treatment.[3] In his Recommended Decision, the magistrate judge found that Petitioner's claims were ineligible for mixed-motive treatment because she failed to present direct evidence of discrimination. Although Petitioner objected to the Recommended Decision insofar as it granted summary judgment to Wal-Mart on the punitive damages claims, she

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[3] Although the First Circuit decided this case on other grounds, Wal-Mart can still assert this waiver argument as it was properly raised below. Granfinanciera v. Nordberg, 492 U.S. 33, 38-39 (1989) ("Without cross-petitioning for certiorari, a prevailing party may, of course, "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected or even considered by the District Court or the Court of Appeals."); Whitley v. Albers, 475 U.S. 312 (1986); U.S. v. N.Y. Telephone Co., 434 U.S. 159 (1977).

acceded to the determination that she had not garnered the quality of evidence necessary to unleash mixed-motive analysis by failing to object to that ruling. The district court adopted the magistrate's Recommended Decision, and Petitioner did not move for reconsideration as the case proceeded to trial.

As a matter of law, Petitioner waived her right to appeal the magistrate judge's finding that her claims were ineligible for mixed-motive treatment. The law of the First Circuit clearly prohibits appellate review of a magistrate's decision in the absence of a timely objection to the district judge. See Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 5 (1st Cir. 1999); Pagano v. Frank, 983 F.2d 343 (1st Cir. 1993).

Petitioner's failure to object to the entire Recommended Decision operated as a waiver of her right to seek appellate review of the unobjected-to findings of fact and conclusions of law contained therein. See Henley Drilling Co. v. McGee, 36 F.3d 143 (1st Cir. 1994); Davet v. Maccarone, 973 F.2d 22,31 (1st Cir. 1992); Park Motor Mart, Inc. v. Ford Motor Co., 616 F.2d 603, 605 (1st Cir. 1980); See also Thomas v. Arn, 474 U.S. 140, 142 (1985) (permitting appellate courts to establish a rule providing that failure to file objections to a magistrate's report and recommendation waives the right to appeal the district court's judgment).

Petitioner should be prohibited from using her challenge to the jury instructions as a subterfuge to circumvent her failure to object in the district court to the magistrate judge's conclusion that her claims were not eligible for mixed-motive treatment. See Santiago v. Canon U.S.A., Inc., 138 F.3d 1, 4 (1st Cir. 1998) ("a party's failure to assert a specific objection to a report and recommendation irretrievably waives any right to review by the district court and the court of appeals.").

Because this issue can be decided on other grounds, the Court may not even reach the conflicts alleged by Petitioner, and thus the Petitioner has not raised any questions in the context of "meaningful litigation." Monrosa v. Carbon Black, Inc, 359 U.S. 180, 184 (1959). As such, certiorari should be denied.

CONCLUSION

Based on the foregoing reasons, Respondent respectfully requests that the Court deny the Petitioner's request for certiorari.

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